No. 89-1719

In The
Supreme Court of the United States
October Term, 1989

JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ and JERRY MEYER,
Petitioners,

v.

TEXAS GAS TRANSMISSION CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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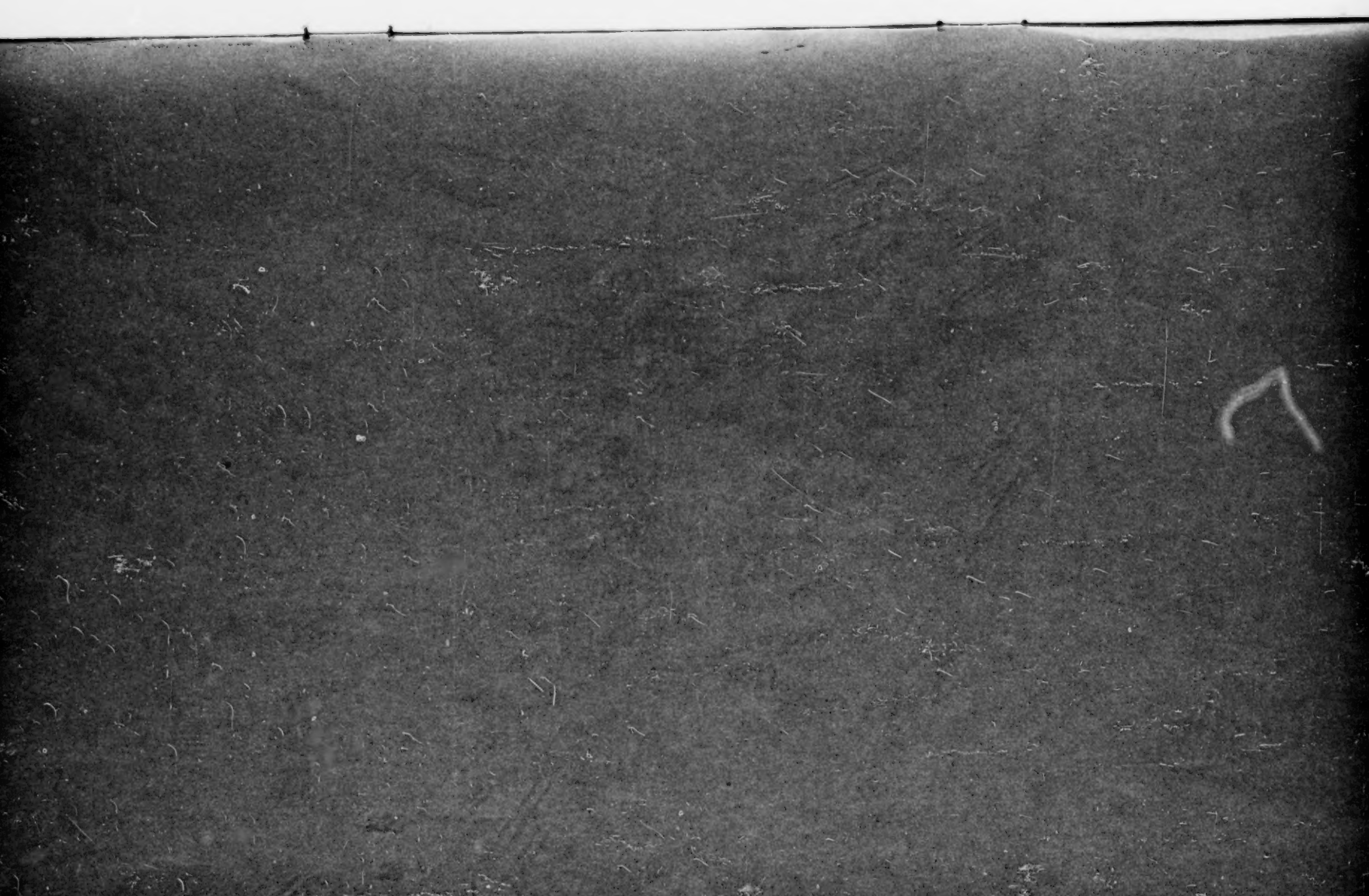

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

I. WHETHER A FEDERAL DISTRICT COURT JUDGE MUST DISCLOSE HIS PRIOR REPRESENTATION OF A FORMER CLIENT THAT IS NOT A PARTY TO THE LITIGATION BEFORE HIM.

II. WHETHER THE SEVENTH CIRCUIT PROPERLY REMANDED PETITIONERS' RETALIATORY DISCHARGE ACTION TO THE STATE COURT BASED UPON *LINGLE V. NORGE*.

III. WHETHER A MOTION TO VACATE UNDER RULE 60(b)(6) CAN BE BASED UPON ALLEGED FRAUD BY PETITIONERS' PRIOR COUNSEL, WHEN THE TIME TO SEEK RELIEF UNDER RULE 60(b)(3) HAS LONG EXPIRED.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ AND JERRY MEYER, and respondents, TEXAS GAS TRANSMISSION CORPORATION, AMERICAN COMMERCIAL LINES, INC., AMERICAN FREIGHT SYSTEM, INC., COMMERCIAL SUPPLIERS, INC., CONTINENTAL TERMINALS, INC., ALL AMERICAN TRANSPORT, INC., and TERMINAL TRANSPORT CO., INC.

The direct or indirect Parent Corporation of TEXAS GAS TRANSMISSION CORPORATION is CSX CORPORATION.

AMERICAN CARRIERS, INC. is the Parent Company or Successor to:

AMERICAN FREIGHT SYSTEM, INC.
COMMERCIAL SUPPLIERS, INC.,
CONTINENTAL TERMINALS, INC.,
ALL AMERICAN TRANSPORT, INC., and
TERMINAL TRANSPORT CO., INC.

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Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on November 30, 1989. It was not reported, but is reprinted at Petitioners' App. p. 1. The petition for rehearing was denied on February 1, 1990. The Memorandum Opinion and Order of the United States District Court dismissing the complaint was entered on December 11, 1987. It was not published, but is reprinted in Petitioners' App. p. 6. The memorandum opinion and order denying plaintiffs' motion to vacate and reconsider was entered on March 2, 1988. It was not published, but is reprinted at Petitioners' App. 13.

JURISDICTION

This Court has jurisdiction of the matter pursuant to Section 28 U.S.C 1254(1).

STATUTES INVOLVED

The following statutory sections are set out in the petition:

28 U.S.C. Sec. 455(a)
28 U.S.C. Sec. 455(b)
29 U.S.C. Sec. 185
Rule 60(b) of the Federal Rules of Civil Procedure

STATEMENT OF THE CASE

In 1986, Petitioners filed a complaint in the Circuit Court of Cook County, Illinois, alleging that they had been discharged from their employment for previously filing a 1977 lawsuit in the Federal District Court. In that 1977 lawsuit, the Honorable Frank McGarr, after trial, entered judgment in favor of the Defendants and against the Petitioners.

The instant (2nd) suit was removed to Federal Court by the Defendants alleging that the state cause of action was preempted by Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. 185). The District Court, Judge Plunkett, granted the Defendants' motion to dismiss for Plaintiffs' failure to exhaust the grievance remedies of the collective bargaining agreement at issue and because the period of limitations run. (Pet. App. 16-21).

Subsequent to the dismissal, Petitioners filed an amended motion to vacate and reconsider, alleging that the state court action was not preempted, and further attacking the judgment in the 1977 suit alleging (i) that the prior judgment was obtained through fraud on the part of the Plaintiffs' prior attorneys, and (ii) that Judge McGarr had improperly failed to disclose a prior association with the Central States Pension Fund, a non-party to the suit. The District Court denied the amended motion to vacate and reconsider, admonishing the Petitioners that "enough is enough". (Pet. App. 13-14).

The Court of Appeals for the Seventh Circuit reversed the District Court's order dismissing the complaint and ordered the case remanded to the state court for future proceedings. The District Court order with respect to the motion to vacate and reconsider was affirmed. (Pet. App. 1-10). The Seventh Circuit Court of Appeals denied the petition for rehearing (Pet. App. 11). The petition for writ of certiorari was docketed on May 2, 1990.

SUMMARY OF THE ARGUMENT

Certiorari is not appropriate. There is no conflict between any decision of this Court and the opinion of the Seventh Circuit, nor between the Seventh Circuit or any other court. The allegation that the trial court judge in the prior 1977 litigation had a duty to disclose its prior representation of a client not a party to the litigation before him is baseless and an unwarranted attack on the judge.

Petitioners' request to review the Court of Appeals' opinion based upon an alleged conflict with *Lingle v. Norge* is without merit, where the Seventh Circuit has reversed the previous dismissal of Petitioners' retaliatory discharge claim based upon *Lingle v. Norge,* and remanded to the Circuit Court of Cook County, Illinois, where the action was originally filed by Petitioners.

Finally, Petitioners' motion to vacate under Rule 60(b) was time barred under 60(b)(3) and presented no extraordinary circumstance to warrant relief under 60(b) (6).

ARGUMENT

I. THERE IS NO DUTY TO DISCLOSE A DISTRICT COURT JUDGE'S PRIOR REPRESENTATION OF A FORMER CLIENT THAT IS NOT A PARTY TO THE LITIGATION BEFORE HIM: THE ATTACK ON JUDGE MCGARR'S IMPARTIALITY IS BASELESS AND UNWARRANTED AND FORMS NO BASIS FOR A GRANT OF CERTIORARI.

In January, 1988, Plaintiff filed in the District Court an "Amended Motion to Vacate or Reconsider", alleging, *inter alia,* that the trial judge in the 1977 litigation, the Honorable Frank McGarr, did not disclose a "compromising interest" in the Defendant Teamsters' Union due to his alleged prior "association" with it as one-time counsel for the Central States Pension Fund. The motion was filed without affidavit. It is uncontested (and admitted by counsel for Petitioner at oral argument before the Seventh Circuit) that Judge McGarr did *not* represent the Defendant Teamsters' Union, or any party to the 1977 lawsuit, and that the Central States Pension Fund was *not* a party to the action.

In bringing this baseless attack upon Judge McGarr to this Court, Petitioners rely primarily upon this Court's opinion in *Lilgeberg v. Heath Services Acquisition Corp.,* 486 U.S. 847, 108 S.Ct. 2194 (1988). This reliance upon *Lilgeberg* is greatly misplaced, as *Lilgeberg* bears no similarity to the instant case. *Lilgeberg,* of course, involved a situation wherein the district court judge, a trustee at a university, presided over a trial, the subject matter of which involved a business deal presently under consideration by the very university board upon which he sat. This Court concluded that disqualification was appropriate pursuant to 28 U.S.C. 455 because (i) the judge's impartiality could reasonably be questioned and (ii) because he, as a fiduciary, had a financial interest in the matter in controversy.

In the instant case, the sole basis for the attack on Judge McGarr, some ten years after the first litigation, is that he at one time represented the Central States Pension Fund, a non-party.

28 U.S.C. 455(b) (2) requires disqualification by a judge where, ". . . in private practice he served as a lawyer in the matter in controversy . . .". In this case, of course, Judge McGarr not only did not serve as a lawyer in the "matter in controversy", he did not represent any of the parties to the litigation. Even the prior representation of a party by a judge or his firm does not automatically require recusal, if the matter is unrelated to the prior representation. *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953 (2nd Cir. 1978) *cert denied* 439 U.S. 1072. *Patterson v. Masem,* 774 F.2d 251, 254 n.2 (8th Cir. 1985). Nor does mere prior association form a reasonable basis for questioning a judge's impartiality. *Maier v. Orr,* 758 F.2d 1578, 1583 (Fed. Cir. 1985). Here, we must stress that there was no prior representation, no prior relationship, and no affidavits alleging that there was.

A charge of impartiality must be supported by a factual basis. *In Re: United States,* 666 F.2d 690, 695 (1st 1981). Disqualification is appropriate only if the facts as seen by an objective, knowledgeable member of the public would lead to a reasonable basis for doubting the judge's impartiality.

The Petitioners below presented no facts upon which recusal or disclosure would be remotely warranted or upon which any reasonable basis to question the judge's impartiality exist. They admitted through counsel at oral argument that there was no prior representation by Judge McGarr of any party to the 1977 lawsuit. Therefore, there was no basis for Judge McGarr to make the disclosures complained of. As Justice Rhenquist has stated, a federal judge has a duty to sit when not disqualified, which is equally as strong as the duty to not sit where disqualified. *Laird v. Tatum,* 409 U.S. 824, 93 S.Ct. 7 (1972) (Memorandum on Motion to Recuse).

The District Court concluded that no reasonable person could question Judge McGarr's impartiality from the petition presented. The Seventh Circuit Court of Appeals found the allegations baseless and unwarranted. There is certainly no conflict between the opinions below and the decisions of this Court, or any other circuit. Any further review by this Court is likewise baseless and unwarranted. As Judge Plunkett admonished the Petitioners, "enough is enough".

II. THE OPINION OF THE SEVENTH CIRCUIT GRANTS PETITONERS THE RELIEF THEY SOUGHT BASED UPON *LINGLE.*

In what can only be described as an anomaly, Petitioners seek a review of the Seventh Circuit ruling in their favor, based upon *Lingle v. Norge*, 486 U.S. 399, 108 S.Ct. 1877 (1988). This strange circumstance puts Respondents in the unusual position of justifying a ruling contrary to their position below and against their favor.

In the District Court, Defendants moved to dismiss Petitioners' retaliatory discharge complaint, as preempted under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C., Section 185). The District Court, relying upon the Seventh Circuit opinion in *Lingle*, (823 F.2d 1031) (9th Cir. 1987 (en banc)), granted the motion to dismiss.

The Seventh Circuit, however, relying on this Court's subsequent reversal of its prior *Lingle* opinion, found that no interpretation of the collective bargaining agreement was required to resolve the dispute, and that Petitioners' retaliatory discharge action was not preempted under Section 301.

The instant case was originally removed to the District Court from the Circuit Court of Cook County, Illinois, based upon the then perceived federal question raised by Section 301. Absent a federal question, however, this case is properly remanded to the state court. In fact, Petitioners, in their reply brief to the Court of Appeals, stated that, ". . . if there is no federal jurisdiction or preemption, the matter should be remanded to the state courts. . ." (P. 14 Appellants' Reply Brief before the Seventh Circuit). That is the relief granted by the Court of Appeals and Petitioners should not now be heard to complain. Thus, the only inconsistency raised is that which exists between a ruling in Petitioners' favor and its request for a grant of certiorari to review that ruling.

III. RULE 60(b) OFFERS PETITIONERS NO BASIS FOR RELIEF.

Petitioners also seek review by certiorari on the basis of the District Court's denial of their motions to vacate the 1981 judgment pursuant to Federal Rules 60(b) (3) and 60(b) (6), and the subsequent affirmation of that denial by the Seventh Circuit. With the exception of the baseless claims regarding Judge McGarr, the other matters raise issues of fraud and misconduct by Petitioners' prior counsel, and fall squarely within 60(b) (3) and not 60(b) (6). Clause 6 of Rule 60 and the preceding clauses are mutually exclusive; a motion brought under Clause 6 must be for some reason other than the five reasons preceding it. *Corex Corp. v. United States,* 638 F.2d 119, 121 (9th Cir. 1981). As succinctly noted by the Seventh Circuit, Petitioners' attacks under 60(b) (3) are clearly untimely as the allegations of fraud, misrepresentation and misconduct are governed by the one-year limitation of Rule 60(b).

Finally, Rule 60(b) (6) offers relief from a judgment in only the most extraordinary of circumstances. *Klapprott v. United States,* 335 U.S. 601, 613, 614, 69 S.Ct. 384 (1949); *Ackermann v. United States,* 340 U.S. 193, 202, 71 S.Ct. 209 (1950). No demonstration is made that such extraordinary circumstances exist to warrant such drastic relief.

The thrust of Petitioners' fraud allegations concern alleged misconduct of their prior attorneys. Petitioners' interests in that regard were protected by virtue of their suit against their prior attorneys. See *Peterson v. Intini,* No. 87 C 1923 (N.D. Ill) (dismissed with prejudice May 29, 1987). Further, even if they had no other avenue of relief available to them, the alleged fraud on the part of Petitioners' prior counsel was discovered by Petitioner in 1983 (Peterson's affidavit of December, 1987), yet not raised until December, 1987, hardly a reasonable period of time to proceed under Rule 60(b) (6). Clearly no issues are raised which warrant review by the United States Supreme Court.

CONCLUSION

For all of the above reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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